SUPREME COURT OF FLORIDA

MARYLAND CASUALTY COMPANY,
B.A.T. PIPELINE, INC. and
SEAN FRANKLIN KINGMAN,

Petitioners,

-vs- CASE NO. 65,873

RELIANCE INSURANCE COMPANY
and BOB SALMON, INC.,

Respondents.
_____/

BRIEF OF RESPONDENTS, RELIANCE INSURANCE COMPANY and BOB SALMON, INC., ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

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STATEMENT OF CASE AND FACTS

Introduction

This case is before the Court based upon discretionary certiorari review. The Petitioners, MARYLAND CASUALTY COMPANY, B.A.T. PIPELINE, INC., and SEAN FRANKLIN KINGMAN, were Defendants, Cross-plaintiffs, and Cross-defendants in the trial court, Appellees in the District Court of Appeal, Fourth District, and will be referred to herein as "MARYLAND", "BAT", and "KINGMAN" respectively. The Respondents, RELIANCE INSURANCE COMPANY and BOB SALMON, INC., were Defendants, Cross-plaintiffs, and Cross-defendants in the trial court, Appellants in the District Court of Appeal, and will be referred to in this brief as "RELIANCE" and "SALMON" respectively.

The following symbols will be utilized in this brief:

"A" -- Appendix filed simultaneously herewith

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

RELIANCE and SALMON accept the statement of case and facts as presented by MARYLAND in the stipulated factual situation.

POINTS INVOLVED ON APPEAL

Point I

WHETHER THE LESSOR OF A MOTOR VEHICLE IS REQUIRED TO PROVIDE PRIMARY INSURANCE COVERAGE FOR A LESSEE BEYOND THE TERMS OF FLA. STAT. SECTION 627.7263 WHEN THERE IS NO WRITTEN LEASE AGREEMENT, THE LESSOR HAS NOT CONTRACTED TO PROVIDE INSURANCE COVERAGE, AND THE LESSEE MAINTAINS APPLICABLE LIABILITY INSURANCE.

Point II

WHETHER AN INSURANCE COMPANY WHICH HAS A CONTRACTUAL DUTY TO PROVIDE A LEGAL DEFENSE FOR ITS NAMED INSURED IS ENTITLED TO REIMBURSEMENT FOR ATTORNEY'S FEES FROM A SEPARATE INSURANCE COMPANY WHICH ALLEGEDLY ALSO HAS A SEPARATE OBLIGATION TO PROVIDE A LEGAL DEFENSE?

SUMMARY OF ARGUMENT

Point I

THE LESSOR OF A MOTOR VEHICLE IS NOT REQUIRED TO PROVIDE PRIMARY INSURANCE COVERAGE FOR A LESSEE BEYOND THE TERMS OF FLA. STAT. SECTION 627.7263 WHEN THERE IS NO WRITTEN LEASE AGREEMENT, THE LESSOR HAS NOT CONTRACTED TO PROVIDE INSURANCE COVERAGE, AND THE LESSEE MAINTAINS APPLICABLE LIABILITY INSURANCE COVERAGE.

Florida common law recognizes that a motor vehicle owner who is only vicariously liable for injuries based upon the wrongful conduct of a driver of the motor vehicle is entitled to indemnification from the negligent operator. This common law concept is modified only to the extent required by Fla. Stat. Section 627.7263, which requires a lessor to be primarily responsible for a motor vehicle incident up to the requirements of the Florida financial responsibility laws. In the absence of a separate agreement to provide insurance or some other contractual obligation, the lessor is not required to provide primary protection for a lessee above and beyond the provisions of Fla. Stat. Section 627.7263 when the lessee has applicable insurance coverage.

The insurance policy issued by RELIANCE to SALMON is not a policy directly applicable in this case in that it contains a classical "escape clause" and the provisions of the MARYLAND insurance policy are directly applicable to provide protection in this case.

Point II

AN INSURANCE COMPANY WHICH HAS A CONTRACTUAL DUTY TO PROVIDE A LEGAL DEFENSE FOR ITS NAMED INSURED IS NOT ENTITLED TO REIMBURSEMENT FOR ATTORNEY'S FEES FROM A SEPARATE INSURANCE COMPANY WHICH ALLEGEDLY ALSO HAS A SEPARATE OBLIGATION TO PROVIDE A LEGAL DEFENSE.

The duty of an insurer to defend its named insured is personal and does not flow to the benefit of any other insurance company. An insurence company which provides legal counsel to its insured pursuant to a contractual obligation to provide a legal defense has no common law cause of action to recover such attorney's fees from any other insurance company and there are no subrogation, quasi-contractual, or other equitable remedies available to reimburse an insurance company for providing a legal defense to its named insured which is required by contract.

ARGUMENT

Point I

THE LESSOR OF A MOTOR VEHICLE IS NOT REQUIRED TO PROVIDE PRIMARY INSURANCE COVERAGE FOR A LESSEE BEYOND THE TERMS OF FLA. STAT. SECTION 627.7263 WHEN THERE IS NO WRITTEN LEASE AGREEMENT, THE LESSOR HAS NOT CONTRACTED TO PROVIDE INSURANCE COVERAGE, AND THE LESSEE MAINTAINS APPLICABLE LIABILITY INSURANCE.

The decision under review and its operative effect are fully consistent with long-standing elements of basic Florida law. Proper analysis begins with a review of the basic rights and responsibilities flowing between a mere owner of a vehicle and an actively negligent operator of the vehicle. Secondly, attention must be directed to whether there are any statutory provisions or contractual agreements which modify the basic Florida law otherwise applicable.

The fundamental and underlying principle of law applicable in this case is that fault attracts and assumes primary responsibility. Common law negligence principles impose vicarious responsibility upon the mere owner (SALMON) of a motor vehicle when it is negligently operated by some other person. This responsibility is imposed because of a relationship to the vehicle as opposed to any active wrongful conduct. On the other hand, responsibility is imposed upon the operator (BAT and KINGMAN) of a motor vehicle based upon negligence and direct wrongful conduct. In this type of situation, one who is without fault and is only vicariously responsible to a third party is entitled to indemnification from the active tort-feasor or person who was the direct cause of the accident. See, e.g., Houdaille Indus. v. Edwards, 374 So.2d 490 (Fla. 1979).

This concept is directly applicable in the motor vehicle owner/separate driver situation. A motor vehicle owner (SALMON), who is only vicariously liable for injuries based upon another person's (BAT and KINGMAN) operation of the vehicle, is entitled to indemnification from the negligent operator (BAT and KINGMAN). Hertz Corp. v. Richards, 224 So.2d 784 (Fla. 3d DCA 1969); Rebhan Leasing Corp. v. Trias, 419 So.2d 352 (Fla. 3d DCA 1982), cert. denied, 427 So.2d 738 (Fla. 1983); Allstate Ins. Co. of Canada v. Value Rent-A-Car of Fla., Inc., 10 F.L.W. 117 (Fla. 5th DCA Jan. 3, 1985).

Next, one finds that Fla. Stat. Section 627.7263 addresses and creates a limited exception to the underlying common law principles as specifically stated in its title--Rental and leasing driver's insurance to be primary; exception. The title affords at least some insight as to the intended operation of the legislation. See, e.g., Parker v. State, 406 So.2d 1089 (Fla. 1982); Board of Public Instruction of Broward County v. State ex rel. Allen, 219 So.2d 430 (Fla. 1969). This statutory requirement is very specific and provides:

> 627.7263 Rental and leasing driver's insurance to be primary; exception.--
>
> (1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.
>
> (2) Each rental or lease agreement between the lessee and the lessor shall contain a provision on the face of the agreement, stated in bold type, informing the lessee of the provisions of subsection (1) and shall provide a space for the name of the lessee's insurance company if the lessor's insurance is not to be primary.

This provision must be applied consistent with the specific language. If the Florida Legislature had intended that a lessor (SALMON) provide full, unlimited, and complete primary insurance coverage the Legislature could have easily so stated, but it did not do so. It is clear that this statutory provision requires only that a lessor provide for primary responsibility "for the limits of liability and personal injury protection coverage" as required by the basic Florida responsibility laws.

There have been several decisions involving the application of Fla. Stat. Section 627.7263, and when the factual situations are properly analyzed, the decisions are totally consistent in interpretation and totally consistent with existing Florida law. Further, the decisions are in conformity with the underlying principle of law announced by this Court in Insurance Co. of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977), in which this Court stated:

> In our view, the financial responsibility law is only relevant to situations such as this insofar as it is necessary to protect the public from uncompensated losses arising from the use of motor vehicles. To this end the law requires motor vehicle owners to provide liability insurance coverage for the operation of their motor vehicles on the highways of this state. Independent of this insurance requirement is the common law obligation of vehicle owners under the dangerous instrumentality doctrine. But neither of these financial responsibility principles bear on the allocation of risk between owners and operators in excess of minimum statutory coverage, or on the right of indemnification which derives from the common law principle that fault attracts primary responsibility. id., at 1153.

Thus, in Patton v. Lindo's Rent-A-Car, Inc., 415 So.43 (Fla. 2d DCA 1982), the Court limited a lessor's (SALMON'S) primary responsibility to the financial responsibility re-

quirements when it held:

> We hold that section 627.7263, Florida Statutes (1979), provides the exclusive method of shifting primary liability coverage from the lessor to the lessee, and if the lessor fails to comply with the requirements of this section, he is primarily liable up to the financial responsibility requirements of the law regardless of any other provision contained in the rental agreement or policy. Patton at 45.

The Court recognized that after satisfaction of the financial responsibility limits the Insurance Co. of North America v. Avis Rent-A-Car System, Inc. concepts became applicable and the lessor's liability was totally limited to the financial responsibility requirements.

It should be noted that in Patton there was a written rental agreement which contained a paragraph requiring the lessee to indemnify the lessor against loss arising out of the use of the motor vehicle. Although there is no written rental agreement involved in this case, the indemnification paragraph in Patton is identical to the fundamental common law indemnification rights vested in the lessor (SALMON) in this case under Florida law. Thus, it is submitted that the Patton decision and the decision of the District Court of Appeal below set forth the correct law applicable in this case.

A similar approach, analysis, and result can be found in Allstate Ins. Co. of Canada v. Value Rent-A-Car of Florida, Inc., 10 F.L.W. 117 (Fla. 5th DCA Jan. 3, 1985). In Allstate, even though the lessor had contractually agreed to provide liabiliy insurance coverage (unlike the present case), the Court applied a contractual indemnification clause (which was identical to Florida's common law indemnification concept) and

held that the lessor (SALMON) was responsible only for the financial responsibility limits and the lessee (BAT and KINGMAN) was responsible thereafter up to the limits of the lessees' insurance policy.

The foregoing decisions set forth the applicable law for this case. If there is no written contract between a lessor and a lessee relating to an apportionment of risk, Florida common law indemnification concepts become applicable to any losses beyond the financial responsibility requirements established by Fla. Stat. Section 627.7263. In a similar manner, if a written contract exists and requires a lessee to indemnify a lessor consistent with Florida common law indemnification concepts, Fla. Stat. Section 627.7263 merely requires a lessor to protect up to the financial responsibility requirements and the lessee maintains primary responsibility thereafter.

The result can be altered by a written contract which addresses an apportionment of risk between a lessor/lessee in a different fashion. This type of situation can be found in Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984). In Sunshine, as noted on page 396 the lease agreement specifically established that the lessor agreed to maintain automobile liability insurance coverage in connection with the use of a motor vehicle. Further, the indemnification concept was addressed in a manner that the lessee was required to provide indemnification only for the losses which were not covered by the insurance which the lessor was required to provide under the agreement. Such factual situation required the lessor to provide full and complete protection for the

operation of the motor vehicle. Under such factual situation it has long been held that a lessor is not entitled to indemnification when the lessor specifically agrees to provide insurance coverage for the operation of a motor vehicle. See, e.g., Morse Auto Rentals, Inc. v. Lewis, 161 So.2d 235 (Fla. 3d DCA 1964); Truck Discount Corp. v. Serano, 362 So.2d 340 (Fla. 1st DCA 1978). Thus, a lessor is not entitled to common law indemnification when the lessor has specifically contracted to provide insurance coverage for the operation of a motor vehicle. Such factual situation is not present in this case.

A similar result can be found in P&H Vehicle Rental & Leasing Corp. v. Garner, 416 So.2d 503 (Fla. 5th DCA 1982), in which a lease agreement stated that the vehicle was covered by an automobile liability insurance policy. The lessor and its insurance company attempted to contest responsibility on the basis that a lessee had operated the vehicle while intoxicated and such voided any protection. The Court rejected such argument and held that the lessor's insurance coverage was primary but did not fully explain or address responsibility beyond the financial responsibility requirements of Fla. Stat. Section 627.7263. However, the Court dismissed the appeal as it pertained to indemnification without prejudice to the rights of the lessor to present the issue in an appeal from a final judgment.

Additionally, it is submitted that the position asserted by the lessees, MARYLAND, BAT and KINGMAN, in the District Court of Appeal below and in this Court with regard to the priority of insurance coverage provided by the two insurance policies

would not support a decision in their favor. It must be noted that a conflict has developed among the district courts of appeal with regard to the application of insurance policies in the motor vehicle owner/separate driver tort situation. The Allstate Ins. Co. v. Fowler, 455 So.2d 506 (Fla. 1st DCA 1984), and Hartford Acc. & Indem. Co. v. Kellman, 375 So.2d 26 (Fla. 3d DCA 1979), cert. denied, 385 So.2d 755 (Fla. 1980), view places initial and primary responsibility upon the insurer of the active tort-feasor and secondary responsibility upon the insurer of the vicariously liable owner. On the other hand, the Sentry Ins. Co. v. Aetna Ins. Co., 450 So.2d 1233 (Fla. 2d DCA 1984), view looks to the insurance documents and any provisions which address coverage. In this case, SALMON and RELIANCE must prevail no matter which view is adopted by this Court.

First, the stipulated factual situation clearly demonstrates that the responsibility of SALMON is totally vicarious and under the Allstate and Hartford view primary responsibility would be placed upon MARYLAND and the active tort-feasors, BAT and KINGMAN. Second, the brief filed by MARYLAND, BAT and KINGMAN in the District Court of Appeal, Fourth District, on pages 12 and 13, discussed the policy provisions upon which argument was made. (See excerpts of brief contained in Appendix filed simultaneously herewith.) In the brief filed with the District Court of Appeal, Fourth District, MARYLAND, BAT and KINGMAN directed the Court's attention to insurance policy provisions as follows:

> Finally, the Reliance Insurance Company policy issued to the lessor, Bob Salmon, Inc., provides as

follows:

> II Persons Insured
> Each of the following is an insured under this insurance to the extent set forth below:
> (e) With respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law,
> (i) an employee of the named insured...
> and
> (ii) any other person while operating with the permission of the named insured any such equipment registered in the name of the named indured insured and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or organization. (Ex. 2)

The Maryland Casualty Company policy issued to the lessee, B.A.T. Pipeline, Inc., provides as follows:

> Part VI - Conditions
> B. OTHER INSURANCE
> 1. . . . for any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance . . . (Ex. 3) (Appendix filed by SALMON and RELIANCE 1-2).

Thereafter, on page 13 of their brief in the lower appellate court MARYLAND, BAT and KINGMAN merely concluded that both of the insurance policies contained "escape clauses" and then concluded that they were repugnant and inapplicable.

In this Court, MARYLAND, BAT and KINGMAN state that their policy contains an "escape clause" but it is submitted that the MARYLAND policy contains the classic excess insurance clause and such is not an escape clause. On the other hand, the provision quoted at length by MARYLAND, BAT and KINGMAN from the RELIANCE policy is the classic escape clause. See, Auto Owners Ins. Co. v. Palm Beach County, 157 So.2d 820 (Fla. 2d DCA 1963).

Under these circumstances the provisions of the SALMON and RELIANCE policy are given full effect and the MARYLAND, BAT and KINGMAN policy applies on a primary basis in accordance with the decision of this Court in Continental Cas. Co. v. Weekes, 74 So. 367 (Fla. 1954). Thus, based upon the language quoted by MARYLAND, BAT and KINGMAN in the District Court of Appeal, they cannot prevail in connection with the argument as to insurance coverage.

Additionally, the same proposition eliminates the argument of MARYLAND, BAT and KINGMAN that an insurer cannot seek indemnification from an insured. It is clear that BAT and KINGMAN were insureds only if there was no other insurance available, which was not the case. A reading of Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976), supports the position of SALMON and RELIANCE in this case and does not support the position asserted by MARYLAND. Additionally, MARYLAND'S reliance upon Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973), is misplaced. In Ray, the person against whom indemnification was sought was described as an insured. Such is not presented in this case because the persons insured provision which MARYLAND quoted in the lower court clearly demonstrates that one is an omnibus insured only if there is no other collectible insurance available. Thus, the concept of seeking indemnification from an insured is simply not applicable in this case.

Point II

AN INSURANCE COMPANY WHICH HAS A CONTRACTUAL DUTY TO PROVIDE A LEGAL DEFENSE FOR ITS NAMED INSURED IS NOT ENTITLED TO REIMBURSEMENT FOR ATTORNEY'S FEES FROM A SEPARATE INSURANCE COMPANY WHICH ALLEGEDLY ALSO HAS A SEPARATE OBLIGATION TO PROVIDE A LEGAL DEFENSE.

MARYLAND is simply not entitled to any type of reimbursement for attorney's fees in this litigation under any theory. MARYLAND presents no authorities in support of its position and none exist which would support such an award. First, MARYLAND predicates its entire "attorney fee" argument upon the theory that MARYLAND should prevail in connection with the substantive issues in this case. It is submitted that MARYLAND'S position is incorrect and MARYLAND'S position has been rejected on at least one other occasion in the State of Florida.

In Argonaut Ins. Co. v. Maryland Cas. Co., 372 So.2d 960 (Fla. 3d DCA 1979), the District Court of Appeal, Third District, considered the precise issue presented in connection with the attorney fee controversy in this case. In Argonaut the Court clearly held that the duty of each insurer to defend its insured is totally personal and cannot flow to the benefit of some other insurance company. The Appendix filed by MARYLAND in this case demonstrates on its face that MARYLAND agreed to not only pay all sums which the insured became legally obligated to pay, but also agreed to defend the insured as follows:

> We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy. We may investigate and settle any claim or suit as we consider appropriate. Our payment of the LIABILITY INSURANCE limit ends our duty to defend or settle.

This separage contractual obligation flowing to its insured

does not translate into any type of subrogated or equitable interest against SALMON or RELIANCE in this case for attorney's fees. There is no common law cause of action and the duty to provide defense counsel was personal between an insurance company and its named insured. It is clear that BAT and KINGMAN did not incur attorney's fees in this case. It was MARYLAND who incurred such fees, if any, pursuant to its contractual agreement to provide a legal defense. As noted in Argonaut, MARYLAND simply incurred attorney's fees and costs in fulfilling it direct and absolute contractual obligations and is not entitled to payment from any other insurance company.

The Argonaut decision is directly applicable in this case and a review of the law applicable in foreign jurisdictions supports this result. See, e.g., Maryland Cas. Co. v. American Family Ins. Group, 429 P.2d 931 (Kan. 1967); Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co., 150 N.W.2d 233 (Minn. 1967); Firemen's Fund Ins. Co. v. North Carolina Farm Bureau Mut'l Ins. Co., 152 S.E.2d 513 (N.C. 1967); Nordby v. Atlantic Mut'l Ins., 329 N.W.2d 820 (Minn. 1983); U.S.F.&G. v. TriState Ins. Co., 285 F.2d 579 (10th Cir. 1960); Canal Ins. Co. v. Occidental Fire & Cas. Co., 462 F.Supp. 512 (Western Dist. Okla. 1978); Travelers Ins. Co. v. American Fidelity & Cas. Co., 164 F.Supp. 393 (Dist. Minn. 1958). It is submitted that MARYLAND is not entitled to attorney's fees in connection with defending its named insured pursuant to its separate contractual duty to provide a legal defense.

CONCLUSION

Based upon the reasoning, authorities and arguments set forth herein, it is respectfully submitted that the decision of the District Court of Appeal, Fourth District, should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 11th day of March, 1985, to: Scott N. Richardson, Esq., REID & RICCA, P.A., Attorneys for Defendants, RELIANCE/SALMON, P.O. Drawer 2926, West Palm Beach, FL 33402; Rosemary Cooney, Esq., PAXTON, CROW, BRAGG & AUSTIN, P.A., Attorneys for MARYLAND CAS. CO./B.A.T./KINGMAN, P.O. Drawer 1189, West Palm Beach, FL 33402; and to Richard J. Meehan, Esq., MEEHAN AND FOLEY, Attorneys for Plaintiffs, Suite 503, 4440 PGA Boulevard, Palm Beach Gardens, FL 33410.

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